

Supreme Court, U. S.
FILED
SEP 15 1978
MICHAEL ROBAX, JR., CLERK

No. 78-156

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. WHELAN AND THOMAS M. FLAHERTY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.,

Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

We file this memorandum to advise the Court of developments in the case of respondents Whelan and Flaherty.

We did not seek a stay of the judgment of the court of appeals in this case, and so the district court began the remand proceedings required by the court of appeals. Before the district court had issued its order, however, the Parole Commission decided to release respondents Whelan and Flaherty on parole. See Pet. 15 n. 10a. The district court then filed an opinion stat-

ing that the case was moot because respondents had received adequate relief (App. A, *infra*, pp. 5-10). The court's opinion also questioned the assumptions of the court of appeals (see Pet. App. 11a) concerning the amount of time prisoners sentenced during or prior to 1970 could expect to serve before release on parole. Judge Biunno computed the length of time that persons sentenced by Judge Shaw had served; the computations established that many persons sentenced during or prior to 1970 had served a good deal more than one-third of their sentences.

Both the United States Attorney and counsel for respondents Whelan and Flaherty then wrote to Judge Biunno, stating their positions that the release of respondents on parole would not make the case moot. See Pet. 15 n. 10a. Judge Biunno wrote a further opinion (App. B, *infra*, pp. 11-14), stating that, although the case was not moot "in the usual sense" (*id.* at 11), there was no need to pass on respondents' motions for reduction of sentence.

Before learning of Judge Biunno's second opinion, the Parole Commission had voted to defer the release of respondents Whelan and Flaherty pending completion of further investigation. Information in the possession of the Commission indicated that respondents had not been entirely candid with the Commission concerning the status of the monies respondents had wrongfully obtained. The Commission set a hearing for October 1978 to consider rescission of respondent's parole.

Respondents Whelan and Flaherty promptly requested the district court to reinstate and grant their motions for reduction of sentence. Judge Biunno vacated his earlier decisions concerning mootness, and on August 23, 1978, reduced the sentences of respondents (Apps. C and D, *infra*, pp. 15-20). Judge Biunno did not write an opinion explaining this reduction.¹ The terms of the new sentence required the immediate release of respondents Whelan and Flaherty on accumulated good time credits. We have been informed that respondents Whelan and Flaherty plan to seek further judicial review of the terms of their sentence reduction and release. As required by Judge Biunno's order, however, both respondents now have been released.

The further proceedings on remand, and the release of respondents Whelan and Flaherty pursuant to the district court's order, do not affect this case or make it moot. See *Mancusi v. Stubbs*, 408 U.S. 204, 205-207 (1972); *Commissioner v. Shapiro*, 424 U.S. 614, 624 n.9 (1976). If, as we argue, the courts do not have authority to revise lawful sentences in response to parole decisions or changes in parole policies, then this Court should reverse the judgment of the court of appeals; the effect of that reversal—like the effect of the reversal we seek in the case of respondent Addonizio, who was initially released by the district court—

¹ Judge Biunno gave an oral statement of reasons. We have ordered but have not yet received a copy of the transcript.

would be to annul the revisions in the sentences and to restore the original sentences.²

In sum, the further proceedings in the district court have not mooted the case or reduced the need for review of the court of appeals' decision. Indeed, to the extent that the proceedings on remand concerning respondents Whelan and Flaherty are relevant at all, they illustrate our contention that the court of appeals' rule simply enables district courts to review parole decisions with which they may disagree. For the reasons we have set out in the petition, we believe that courts may not do so, and that the issue should be addressed by this Court.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

² Even if respondents were paroled or mandatorily released by the Commission, they would be in parole status if the court of appeals decision were reversed. If, on the other hand, there were a reduction of their sentence to time served, as they seek, or to some other maximum less than that originally imposed by Judge Shaw, their period of parole supervision would be shortened or eliminated.

APPENDIX A

United States District Court for the District of
New Jersey

Civ. 76-2220 (Cr. 567-70)

UNITED STATES

v.

THOMAS J. WHELAN AND THOMAS FLAHERTY

Memorandum

BIUNNO, District Judge

Pursuant to mandate of the Court of Appeals after the decision in *Addonizio v. U.S.* (Appeals of Whelan and Flaherty), 573 F. 2d 147 (CA-3, 1978), the dismissal of the motions of Whelan and Flaherty for reduction or modification of sentence under 28 USC § 2255 was reversed, and the matter remanded for reconsideration because in this court's ruling, 427 F. Supp. 379 (D-N.J., 1977), it had taken the law to be that there was no jurisdiction.

At the time of the initial ruling, the Court of Appeals had found § 2255 jurisdiction, after the 120 limit set by Rule 35, by collateral attack on the ground that application by the Parole Commission of the guidelines that took effect in late 1973 frustrated the expectations and intentions of the sentencing judge, in very limited circumstances.

The first case, *U.S. v. Salerno*, 538 F. 2d 1005 (CA-3, 1976) involved a defendant sentenced to 3 years, with parole eligibility under 18 USC § 4208(a)(2) [now, § 4205(b)(2)], before the guidelines existed. Be-

cause of delay for appeal of his conviction, the defendant did not start serving his sentence until July 1, 1974. He was told then that these indicated 45 to 55 months of incarceration (longer than his entire sentence).

On petition for *rehearing*, 542 F. 2d 628 (CA-3, 1976) it was emphasized that the holding was a narrow one, applicable only to sentences setting eligibility for parole under § 4208(a)(2), and that motions under § 2255 did not vest the courts with power of a super parole board.

The second case, *U.S. v. Somers*, 552 F. 2d 108 (CA-3, 1977) also involved § 4208(a)(2) parole eligibility, and the court restated "the admonition * * * that the * * * doctrine is a most narrow and inelastic principle which will not be expanded beyond its strict confines," 552 F. 2d at 114.

In the third case, *U.S. v. Solly*, 559 F. 2d 230 (CA-3, 1977) the *Salerno* doctrine was extended to a sentence with parole eligibility established under § 4201(a)(1).

Application of the *Salerno* doctrine was barred, by *Musto v. U.S.*, 571 F. 2d 136 (CA-3, —) in a case where the judge was aware of the parole guidelines at the time of sentence.

In *Addonizio*, for the first time, the *Salerno* doctrine was extended to any case of frustration of the original intention and expectation of the sentencing judge by the application of later-adopted guidelines, regardless of the source of parole eligibility, whether under § 4202, § 4208(a)(1) or § 4208(a)(2).

Since hearing the parties after remand, in regard to the nature and scope of the reconsideration to be made, the court has been informed that the Parole Commission granted parole to both Whelan and Flaherty for

a date in August, 1978. That action renders moot any further action here, and an order to that effect will be entered.

It may be useful to record the results of an analysis of data compiled in respect to sentences imposed by the late Judge Robert Shaw, who imposed sentence in this case, during his service here, even though the present motion is moot.

What was done involved having the clerk identify all sentences imposed by Judge Shaw for terms of 5 years or more, and then have gathered information showing the date when service of each sentence began and the date when each defendant was released from custody, on parole or otherwise.

Given the starting and release dates, the number of days served was determined with a Hewlett-Packard HP-80 calculator with a programmed calendar to the year 2100 AD. The number of days served was divided by 365 and multiplied by 12 to convert the time served to months, and the result was then divided by the term sentence (in months) to obtain the percentage of the sentence imposed that was served.

In one case, the defendant was credited with time served before sentence, and this was added to the time served after sentence to obtain total time served.

In several cases the defendant is still in custody, and in such cases the time served and percentage of sentence served was calculated to June 30, 1978 to reflect time and percentage served to that date.

The tabulation set out below presents the results of these calculations, arranged in an order to reflect a sequence running from the smallest to the largest percentage. For each entry, only the criminal docket number is shown without giving the name of the par-

ticular defendant, in order to provide the statistical data without intruding into the privacy rights of any individual.

For each entry, the sentence imposed is expressed in months, as is the time served. The basis for release (i.e., parole granted, mandatory release, full term, executive clemency, etc.) is noted for each entry.

Judge Shaw did not specify parole eligibility under § 4208(a)(1) in any of these cases. He specified parole eligibility under 4208(a)(2) in only two cases, one a sentence for 20 years and the other a sentence for consecutive terms totaling 30 years. In three cases, straight sentences imposed by Judge Shaw were modified after his death by another judge to specify parole eligibility under § 4208(a)(2); all three were so modified before the parole guidelines took effect in December, 1973. In one of the three, the surviving judge also reduced the term from 10 years to 8 years. All of these instances are identified in the tabulation.

The dates were gathered and the calculations were made and tabulated, but the court has made no interpretation to ascertain Judge Shaw's original intentions and expectations in view of the fact that the pending motions are moot. The material is set out for publication merely to preserve it for potential future use, all of the work having been done before mootness appeared.

Sentence Tabulation and Calculations

Case No.	Sentence (months)	Time served (months)	Percent served	Basis for release
774-71---	¹ 360	72. 690	20. 19	In custody 6/30/78.
774-71---	300	52. 663	20. 89	In custody 6/30/78.
567-70---	² 180	37. 742	20. 97	Paroled.
774-71---	² 144	32. 942	21. 12	Paroled.
382-69---	144	33. 600	23. 33	Pardon; terminal illness.
567-70---	² 96	22. 882	23. 84	Paroled.
155-67---	168	56. 679	33. 74	Paroled.
342-67---	60	21. 107	35. 18	Paroled.
444-68---	84	33. 107	39. 41	Paroled.
406-66---	¹ 240	99. 682	41. 43	Paroled.
155-67---	180	77. 589	43. 11	Paroled.
567-70---	60	26. 236	43. 73	Paroled.
31-62---	60	27. 682	46. 14	Paroled.
186-64---	60	28. 504	47. 51	Paroled.
567-70---	180	92. 285	51. 27	In custody 6/30/78.
774-71---	60	32. 942	54. 90	Paroled.
204-67---	84	54. 049	64. 34	Mandatory release.
342-67---	84	54. 345	64. 70	Paroled.
429-60---	84	54. 510	64. 89	Mandatory release.
292-70---	60	39. 189	65. 32	Paroled.
152-70---	120	78. 542	65. 45	In custody 6/30/78.
18-66---	120	80. 548	67. 12	Mandatory release.
64-68---	72	49. 216	68. 36	Mandatory release.
382-69---	144	84. 822	84. 76	Mandatory release.
31-62---	120	120	100	Full term.
406-66---	84	84	100	Full term.
155-67---	96	96	100	Full term.
309-68---	60	60	100	Full term.

¹ Parole eligibility under § 4208(a)(2) in original sentence.

² Parole eligibility under § 4208(a)(2) specified by another judge after Judge Shaw's death; in 567-70, 10-year term also reduced to 8 years.

JULY 26, 1978.

s/ VINCENT P. BIUNNO,
U.S.D.J.

United States District Court for the District of
New Jersey

Civ. 76-2220 (Cr. 567-70)

UNITED STATES *v.* THOMAS J. WHELAN AND
THOMAS FLAHERTY

Order

The court having been informed that defendants have both been granted parole by the U.S. Parole Commission for a date in August, 1978,

It is, on this 26th day of July, 1978,

ORDERED that the pending motions under 28 USC § 2255 be, and the same are hereby denied as moot; and it is

FURTHER ORDERED that in the event defendants not be released on parole on the scheduled date, they may apply to the court on 5 days' notice for an order to reinstate the motions.

s/ VINCENT P. BIUNNO,
U.S.D.J.

Original to Clerk.
xc: All parties.

APPENDIX B

United States District Court for the District of
New Jersey

Civil 76-2220 (Cr. 567-70)

UNITED STATES

v.

THOMAS J. WHELAN AND THOMAS FLAHERTY

Addendum to Memorandum

BIUNNO, *District Judge*

This Addendum to the Memorandum dated July 16, 1978 is intended to make clear that the pending motions under 28 USC § 2255 are considered moot only in the sense that, having been granted parole, Whelan and Flaherty need no ruling from this court to be released from incarceration.

Of course, both will remain in "custody" until the expiration of their 15 year sentences in 1986, while they will be on parole supervision. They remain subject to revocation of parole in the event of a future violation, and could lose their "street time" as well as be required to serve the remainder of their sentences.

While this precludes mootness in the usual sense, the point involved is outside the scope of the present motions which are grounded on the denial of parole and continued confinement.

In order to consider the matter further in this sense, Whelan and Flaherty should be afforded a full opportunity to press the point. To make the record complete, supplements to the present motions should be served and filed, along with copies of the parole commission dispositions and briefs and any other pertinent material.

Attention is directed to the fact that none of the cases in the line from *U.S. v. Salerno*, 538 F. 2d 1005 (CA-3, 1976) to *U.S. v. Addonizio*, 573 F. 2d 147 (CA-3, 1978) deals with a situation where release on parole was granted after the filing of a § 2255 motion but before its disposition. The only reference to the subject is in this court's earlier ruling, 427 F. Supp. 379 (D.N.J., 1977), footnote 2.

It also is plain that if this aspect is to be taken up and decided at all, it should be advanced, presented and decided now, by supplement to the motions. The operative facts are known now, and it would be counter to the congressional policy expressed in 28 USC § 2255 that: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner," to entertain new motions between now and 1986.

Both because of the novelty of the question and because the prisoners should be afforded ample time to prepare their papers, the supplements may be served and filed on or before October 10, 1978. If they find that more time is needed, leave is granted to apply *ex parte*, before that date, for an extension to another specific date.

It should be emphasized that the intention is that the matter be raised now, through the opportunity afforded, or not at all, and that any subsequent inde-

pendent motion will be regarded as falling within the congressional policy against repetitious motions for the same relief.

AUGUST 7, 1978.

s/ VINCENT P. BIUNNO,
U.S.D.J.

Original to Clerk.
xc: All counsel.

United States District Court for the
District of New Jersey

Civ. 76-2220 (Cr. 567-70)

UNITED STATES

v.

THOMAS J. WHELAN AND THOMAS FLAHERTY

Amendment to Order

For the reasons stated in the Addendum to Memorandum of even date,

It is, on this 7th day of August, 1978

ORDERED that the order herein dated July 26, 1978 be amended by adding thereto the following provisions:

"FURTHER ORDERED that the pending motions under 28 USC § 2255 may be supplemented by serving and filing the papers indicated in the Addendum to Memorandum, on or before October 10, 1978, with leave granted to apply *ex parte* before that date for an order extending the time to another specific date; and it is

"FURTHER ORDERED that should there be no supplements to the motion served and filed within the time limited or any extension thereof, any later and independently made motions will be regarded as successive motions for similar relief which the court need not consider, pursuant to 28 USC § 2255."

s/ VINCENT P. BIUNNO,
U.S.D.J.

Original to Clerk.
xc: All counsel.

APPENDIX C

United States District Court for the District of
New Jersey

Criminal No. 570-70

(Civil No. 76-2220, § 2255)

UNITED STATES OF AMERICA

v.

THOMAS J. WHELAN, DEFENDANT

Order

This matter having come on for hearing under the Order dated August 17, 1978, and the Court having considered the presentations and argument of the parties through their counsel, therefore, for the reasons stated on the record of the hearing on this date.

IT IS, on this 23rd day of August, 1978, ORDERED THAT:

1. The denial of the motion by the Order dated July 26, 1978 is hereby vacated.
2. The motion to correct the sentence herein is hereby granted.
3. The sentence imposed August 10, 1971 by the late Hon. Robert Shaw, U.S. District Judge, is hereby corrected to read as follows:

The defendant is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment, as follows:

A. On Counts 1, 3, 4, 5, 6, 8, 9, 11, 12, 13, 14, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34, for a term of Ten Years;

B. On Count 2, for a term of Five Years, consecutive to the term sentence imposed under part A hereof. Execution of this Five Year term sentence is suspended, and defendant is placed on probation for a period of Five Years to follow release from parole supervision on the preceding Ten Year term;

C. Special conditions of probation, in addition to the General Conditions, are imposed as follows:

(1) Defendant shall not accept or hold any public office or position of any nature whatsoever;

(2) Defendant shall not engage in any activity, whether individually or on behalf of another, that involves dealing with any governmental or public body or agency, nor shall he accept employment by any person or entity which receives payments of or is financed by public funds in whole or in part;

(3) Defendant shall not engage in any activity, either individually or on behalf of another, which involves or is connected with gambling of any kind, whether legalized or not, and he shall not frequent any place where any such activity is carried out;

(4) Defendant shall keep and maintain complete financial records in writing, to reflect and record any and all assets and

liabilities and all transactions therein, as well as of all money and property received, disbursed or transferred, and such other financial information as may be specified by the Probation Office from time to time. Said records shall be submitted to the Probation Office for inspection on request, but not less often than twice each year, together with defendant's statement under oath that the same are true and complete;

(5) Defendant shall not travel outside the continental United States, and shall not apply for or obtain any passport, except as may be allowed by Order of the Court on terms.

4. The sentence imposed by parts B and C of ¶ 3 hereof is imposed pursuant to 18 U.S.C. § 3651.

5. Defendant shall be credited with all time served since sentence was originally imposed on August 10, 1971.

s/ VINCENT P. BIUNNO,
USDJ.

APPENDIX D

United States District Court for the District of
New Jersey

Criminal No. 570-70

(Civil No. 76-2220, § 2255)

UNITED STATES OF AMERICA

v.

THOMAS FLAHERTY, DEFENDANT

Order

This matter having come on for hearing under the Order dated August 17, 1978, and the Court having considered the presentations and argument of the parties through their counsel, therefore, for the reasons stated on the record of the hearing on this date,

IT IS, on this 23rd day of August, 1978, ORDERED THAT:

1. The denial of the motion by the Order dated July 26, 1978 is hereby vacated.

2. The motion to correct the sentence herein is hereby granted.

3. The sentence imposed August 10, 1971 by the late Hon. Robert Shaw, U.S. District Judge, is hereby corrected to read as follows:

The defendant is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment, as follows:

A. On Counts 1, 3, 4, 5, 6, 8, 9, 11, 12, 13, 14, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27,

(18)

28, 29, 30, 31, 32, 33 and 34, for a term of Ten Years;

B. On Count 2, for a term of Five Years, consecutive to the term sentence imposed under part A hereof. Execution of this Five Year term sentence is suspended, and defendant is placed on probation for a period of Five Years to follow release from parole supervision on the preceding Ten Year term;

C. Special conditions of probation, in addition to the General Conditions, are imposed as follows:

(1) Defendant shall not accept or hold any public office or position of any nature whatsoever;

(2) Defendant shall not engage in any activity, whether individually or on behalf of another, that involves dealing with any governmental or public body or agency, nor shall he accept employment by any person or entity which receives payments of or is financed by public funds in whole or in part;

(3) Defendant shall not engage in any activity, either individually or on behalf of another, which involves or is connected with gambling of any kind, whether legalized or not, and he shall not frequent any place where any such activity is carried on;

(4) Defendant shall keep and maintain complete financial records in writing, to reflect and record any and all assets and liabilities and all transactions therein, as well as of all money and property received, disbursed or transferred, and such other financial information as may be specified by the Probation Office from time to time. Said records shall be submitted to the Probation Office for inspection on request, but not less

often than twice each year, together with defendant's statement under oath that the same are true and complete;

(5) Defendant shall not travel outside the continental United States, and shall not apply for or obtain any passport, except as may be allowed by Order of the Court on terms.

4. The sentence imposed by parts B and C of ¶3 hereof is imposed pursuant to 18 U.S.C. § 3651.

5. Defendant shall be credited with all time served since sentence was originally imposed on August 10, 1971.

s/ VINCENT P. BIUNNO,
USDJ.